THE MLPA "INITIATIVE"
SPECIAL INTEREST FUNDING OF ADMINISTRATIVE REGULATIONS

Submitted on Behalf of
Coastside Fishing Club

Analysis of and Comments Concerning
California Marine Life Protection Act Initiative
Draft Master Plan Framework

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I. INTRODUCTION

Coastside Fishing Club ("Coastside") submits this White Paper in connection with the "Draft Master Plan Framework" dated April 15, 2005 ("Framework"), which was delivered to the Department of Fish and Game ("Department") on April 18, 2005. Coastside believes in properly and positively supporting the MLPA legislation and submits this paper in a proactive spirit to find solutions that are not being addressed by the current process. Coastside submits three basic propositions for consideration by the Department and the Fish and Game Commission ("Commission") which will consider and act upon the Framework:

First, the Framework is the product of a privately funded process that violated specific provisions of the Marine Life Protection Act ("MLPA"), and is beyond the legal authority of the Department to recommend or the Commission to adopt.

Second, the Framework is permeated by an anti-fishing bias that is neither required nor encouraged by the Marine Life Protection Act.

Third, as specifically required by Section 2859 of the MLPA, the Department should recommend and the Commission should adopt a master plan which would have as an essential element recognition of several major de facto Marine Protected Areas ("MPAs") which have been implemented since adoption of the MLPA in 1999. Specifically, Coastside recommends:

- Designation of the few remaining California waters open to bottom trawling, (e.g., California halibut trawl grounds, F&G Code Section 8495 and the area from False Cape to Point Reyes, F&G Code Section 8842) as MPAs.

- Recognition of the Southern California Cow Cod conservation areas as MPAs.

- Designation of the geographic areas covered by the deep water rockfish closures as MPAs.

- Adoption of plans for integrating and managing these "new" areas in networks incorporating the 80 or more MPAs which exist up and down the coast, especially the new Channel Island reserve and conversation areas added in 2003.

The current Framework draft simply does not comply with MLPA. The statutorily required "program" that must accompany the "plan" and the related regulations that must be promulgated by December 2005 necessarily will suffer from the same serious defects and deviations from the clear command of the California Legislature in the Marine Life Protection Act. Consequently, Coastside submits that adoption of the existing draft Framework, in light of the serious legal flaws which underlie and are contained in the document, will be an invitation to otherwise avoidable litigation. On the other hand, Coastside believes that its proposal will allow the Department and the Commission to best keep faith with the legislative commands contained in the MLPA. Each area identified in its proposal meets the formal definitions of an MPA and each is integrated into a more formal federal process for the protection of overfished species and the protection of Essential Fish Habitat.

Section 2859 of the MLPA required that on or before January 1, 2005, the Department of Fish and Game was to have submitted to the Commission a draft master plan "prepared pursuant

to" the Act. That did not happen, and although there is now a "framework" for arriving at such a plan, that framework does not comply with the Legislative requirements. By April 1, 2005, after public review, at least three public meetings, and "appropriate modifications," the department was to have submitted a (proposed) final master plan to the Commission. Submission of the Framework cannot comply with this requirement because the Framework is not the plan the Legislature required. The Commission is required to hold at least two public hearings and to adopt a final master plan, and a Marine Life Protection Program and regulations based on the plan. MLPA Section 2859. And, to the extent funds are available, the Commission is to implement the program – all by December of this year. And, the Commission must submit the master plan, program description, and MPA designations to the Joint Committee on Fisheries and Agriculture, which may provide feedback, which may in turn lead to amendment of the program.

Important deadlines built into the MLPA by the Legislature have been missed. However, the most important deadline – December 1, 2005 – for commission adoption of a plan, a program and regulations, is still attainable. Coastside believes that its proposal will allow that deadline to be met.

II. COASTSIDE FISHING CLUB

Coastside Fishing Club is a non profit organization of recreational anglers and those with connections to recreational angling. Coastside Fishing Club has approximately 10,000 members, a great many of whom live on or near and regularly fish upon the Central and Northern coasts of California. The Club and its members are actively involved in salt water fishing, and the Club has been active in marine fisheries issues. The Club has an intense interest in promulgation of appropriate scientifically based fishing regulations, and in the implementation of protective measures designed to insure that its members and future generations will continue to enjoy ocean fishing in California's waters. Coastside is committed to conservation and enhancement of marine fisheries and resources.

III. THE MLPA LEGISLATION

Because Coastside respectfully submits that the Framework now before the Department misstates and misinterprets important aspects of the MLPA, we begin with an analysis of the statutory scheme. This analysis is intended to put our comments and proposal in proper context.

In 1999, the Marine Life Protection Act was enacted as Fish and Game Code Sections 2850-2863. There are only a few requirements in the law. Essentially, it is a mandate to plan for the implementation of a program of marine areas to be managed as a network. No specific number or configuration of areas is required. Ultimately, the Commission has very broad latitude to do what it believes to be necessary and proper based upon the specialized expertise which it and the Department of Fish and Game possess. However, the process for the plan and the contents of the plan were clearly spelled out by the Legislature. The Framework was not created by the required process and it does not contain the required elements.

A. LEGISLATIVE FINDINGS

Among other things, the MLPA recites the Legislature's findings that then-existing[1] (as of 1999) marine protected areas ("MPAs") had been set up on a piecemeal basis, that fish are a sustainable resource and that fishing is an important community asset. The MLPA states that fishing and MPAs are complementary. It says that marine life reserves ("reserves") are an essential element of an MPA system, and it notes that (as of 1999)[2] only 14 of 220,000 square miles of state and federal water off of California were "genuine no take areas" (a reserve is, under MLPA, a no take area). The MLPA is quite clear that (unless it is a reserve) an MPA can allow for commercial and recreational activities, including fishing for certain fish with certain types of gear provided that such activities are consistent with the objectives of the area and the goals and guidelines of the chapter.

B. MPA DEFINITION UNDER CALIFORNIA LAW

The statute specifically defines the characteristics of an MPA. Whatever might be called an "MPA" in other states or jurisdictions, or however marine biologists, sociologists, or economists might conceive of an "MPA", California law, expressed in Section 2852(c), specifically defines an MPA as having these characteristics (in addition to a name):

- A discrete geographic area seaward of mean high tide, including the mouth of a coastal river, together with overlying water, flora and fauna
- Designated by law, administrative action or voter initiative to conserve marine life and habitat[3]
- An MPA allows for specified commercial and recreational activities including fishing so long as the activities are consistent with the objectives of the area and the goals and guidelines of the MLPA
- MPAs are primarily intended to protect or conserve marine life and habitat
- A marine life reserve is a type of MPA specifically defined as an area in which all extractive activities, including taking marine species, is prohibited. Section 2852(d).

It should be noted that the sites Coastside proposes to be recognized and integrated into the network of MPAs meet these tests and are all legal or de facto MPAs at present.

C. LEGISLATIVELY DEFINED BIOGEOGRAPHICAL REGIONS

In section 2852 the Legislature defined three "biogeographical regions" with boundaries specified at Point Conception (running South to Mexican waters), Point Conception north to Point Arena, and from Point Arena north to Oregon waters. A so-called master plan team

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[1] The Framework, at Appendix I, lists at least 80 existing MPAs in the state. The DFG website lists and summarizes them. http://www.dfg.ca.gov/mrd/mlpa/mpa.html As of April 19, 2005, the DFG site lists many no take areas (recreational and commercial) which would qualify as "Reserves".

[2] Importantly, the extent of no take areas was dramatically increased in 2003 with the addition of the Channel Island reserves. This addition was significant and increased the extent of no take zones in California by a factor of more than ten fold.

[3] This is an important element. The Department and Commission have engaged in a number of administrative actions to conserve marine life – those actions have created de facto MPAs.

required by the MLPA – see below – is empowered to establish an alternative set of boundaries for the three statutorily defined biogeographic regions.[4]

D. IMPORTANCE OF EXISTING MPA'S

When the Legislature enacted MLPA in 1999, there were a great many MPAs in existence. Others were in process. The Legislature, in Section 2853, stated a need to reexamine and redesign that existing MPA system. The section requires that the Commission adopt a Marine Life Protection Program ("Program") which shall have certain "goals". One specific "goal" is to ensure that all MPAs "are designed and managed, to the extent possible, as a network". The MLPA does not mandate a physical or geographically contiguous "network." A management network would comply with the statute – and any network at all is required only "to the extent possible." Nothing in the MLPA requires setting aside tracts of ocean so that "larval dispersal" occurs within defined bounds. The Legislature was focused on the need to manage the large number of existing MPAs in a better way.

As part of improving management of the many existing MPAs, the law requires that the Program have "an *improved*[5] marine life reserve component consistent with the guidelines laid out in Section 2857(c). The section specifically requires the Program to include a process for establishing, modifying or abolishing existing or new MPAs. That is to say the Legislature very clearly contemplated that MPAs will change as conditions or our understanding of facts change.

E. THE MASTER PLAN PROCESS

Section 2855 requires the Commission to adopt a "master plan" that will guide the adoption and implementation of the Program required by Section 2853. The Commission is not required to designate, implement or activate any MPAs, or reserves. What is required, though, is a plan with certain specified components. The Department is charged with responsibility to vet and recommend the plan to the Commission. The master plan must be based on best readily available science. Section 2855 commanded the Department to "convene a master plan team to advise and assist in the preparation of the master plan" (or to hire a contractor to assist in convening the team). Statutory requirements specify personnel for the team:

- Staff from
    - DFG
    - Department of Parks and Recreation
    - State Water resources Control Board
- Five to seven scientists, one of whom may have expertise in economics and culture of California coastal communities
- One member chosen from a list prepared by Sea Grant marine advisors with direct expertise with California ocean habitat and sea life

Section 2856 controls the preparation work leading up to and the master plan ultimately adopted by the Commission. The process for evolving the plan is specified. A required "siting

[4] The statute does not provide that the master plan team or the Commission is free to establish more or fewer than the three biogeographical regions specified by the Legislature. The statute limits changes with respect to these regions to adjustments in their boundaries.

[5] One such improvement (a major step) occurred in 2003 with respect to the Channel Islands.

workshop" process was intended by the Legislature to result in an initial recommendation of a preferred alternative selected from a number of potential MPA networks.[6] Then, the DFG and the master plan team were to develop a preferred siting alternative (from among the alternative MPA networks which were to have been reviewed by the siting workshops). That preferred alternative could (the statute says "may") include MPAs designed to protect habitat by prohibiting potentially damaging fishery practices, etc. It is required that the "preferred" alternative was to include MPA networks with an improved marine life reserve component. It was required (the statute says "shall") that the "preferred" alternative be designed according to guidelines – including that marine life reserves in each "bioregion"[7] shall encompass a representative variety of habitats and communities across a range of depths and environmental conditions. "Similar types of marine habitats and communities shall be replicated, to the extent possible, in more than one marine life reserve in each biogeographical region." Again it is significant that the language requires replication of habitat types, not replication of reserves. While reserve replication makes sense when designing a scientific experiment, the intent is to protect habitat by having the same type of habitat protected in more than one MPA.

So far as Coastside is aware, there was no "siting workshop" process. There has been no development of alternative MPA networks. There is no statutorily compliant "preferred alternative" in the Framework. The Commission is not required by law to adopt the "preferred alternative," but it is required to consider such an alternative.

F. MASTER PLAN CONTENT

The master plan, as adopted, must include certain specific components required by Section 2856(a)(2)[8]. Important requirements found in particular subsections are:

- Recommended alternative networks of MPAs, including marine life reserves in each biogeographical region that are capable of achieving the goals in Section 2853 and designed according to the guidelines in Section 2857. Subsection (D).
    - This section was drafted in such a way as to engender some confusion. Coastside believes the section requires a recommendation of alternative MPA networks in each biogeographical region, each of the recommended alternative networks being capable of achieving specified goals, with each such network designed according to guidelines, and that at least some of these recommended alternative networks include marine reserves. Specifically, there is no requirement, for example, that each of the recommended alternative networks include a marine life reserve in each biogeographical region. Certainly there is no requirement that the plan contemplate two or more reserves in each biogeographical region. A broader construction would conflict with subdivision (F) which requires the designation of

[6] As part of developing the master plan required by Section 2855, Section (Section2857) required that "siting" workshops in each biogeographical region were to be convened on or before July 1, 2001 [sic]. The workshops were to involve interested parties and be located near major working harbors. These siting workshops were to review alternatives for MPA networks and were to provide advice on a preferred siting alternative.

[7] This term, undefined, presumably refers to the three "biogeographical regions" specified by the Legislature. The Legislature was at pains to specify three regions, with boundaries subject to change. Nothing in the statutory scheme suggests that the Legislature intended to require multiple no take 'reserves" in an infinite array of areas, whether termed "biogeographical regions" or "bioregions".

[8] Section 2856(a) requires the Department of Fish and Game and the master plan team, in preparing the master plan, to organize location specific contents, where feasible, by the "biogeographical regions."

a (single) preferred alternative network of MPAs with no concomitant requirement of reserves or any particular number or location of reserves in that preferred network.

- A preservationist view of the language at Section 2856(a)(2) would require that the **final plan** as adopted contain two or more reserves in each biogeographical region that might be defined – not just the three identified by the Legislature. A reading of the statutory scheme as a whole shows this is not the statutory intent. For example, the siting workshops that were to have been convened on or before July 1, 2001 were to generate **proposals** to the Department (which then would craft a submission for the Commission) and those proposals were to include a preferred alternative which, *to the extent possible*, was to feature more than one reserve in each biogeographical region. Section 2857(c)(3) Significantly, this language (which does refer to more than one reserve in each region) refers to a recommendation that was to emanate from a series of "siting workshops" – not to the plan ultimately to be adopted by the Commission. While the proposals were to include a preferred alternative that had reserves, there was no requirement that the competing proposals have reserves, and there is no requirement that the Commission be forced to accept what is proposed to it.

- A recommendation as to the types of habitat that should be "represented" in the MPA system and in marine life reserves. There are a number of habitat types listed; there is no requirement that each or any of them – or any other habitat types that might be identified – be included in the MPA system generally or in reserves, specifically. What is required is a recommendation as to what should be "represented." Subsection (A).

- An identification of "select species or groups of species" likely to benefit from MPAs. Subsection (B).

- Recommendations for a preferred "siting alternative" for a network of MPAs. Subsection (F).

- An analysis of the state's current MPAs based on the preferred alternative, and recommendations whether any of them should be consolidated, expanded, abolished, reclassified or managed differently. Subsection (G).

It is important to note that the Legislature specified that the master plan must include recommendations for alternative networks of MPAs. The master plan may not be just a "framework" establishing a process by which proposals for MPA networks will be promulgated in the future.

Section 2859(b) explicitly requires the Commission to adopt a final master plan and a Marine Life Protection Program, and related regulations -- all by December 1, 2005. Coastside respectfully submits that the framework falls far short of compliance with the legislative requirements, and Coastside notes that well-established law obligates the Commission to confine itself to the authority granted to it by the Legislature. The Commission has no general authority to promulgate regulatory "frameworks," no matter how well-intentioned.

G. GRANT OF REGULATORY AUTHORITY

Section 2860 says the Commission "may" regulate fishing in MPAs – except that any recreational or commercial fishing in a reserve is prohibited. This is a broad grant of authority to the Commission to regulate in MPAs, even as to fisheries and species heretofore regulated only by the Legislature. Coastside believes this is a powerful grant of regulatory authority to the Commission to act in areas where, previously, political legislative pressures (rather than the science and sound fisheries management expertise available to the Commission through the Department of Fish and Game and other resources) has dictated decision making.

IV. SPECIAL INTEREST FUNDING OF THE MLPA "INITIATIVE" TAINTS THE ENTIRE PROCESS

Bolstered by an infusion of private cash from a consortium of environmental groups, starting in the Fall of 2004, the Department began an "initiative" to accomplish the goal of MLPA in a creative way, but in a way that is simply not sanctioned by California law. This initiative is the creature of a three way document (Memorandum of Understanding) among the Resources Agency, DFG and The Resources Legacy Fund Foundation ("RLFF"), an environmental group structured as a tax-exempt non-profit corporation. The essence of the arrangement is that RLFF will pay for development of the regulatory materials required by MLPA. RLFF is a funding front for other "environmental" groups.[9]

The MOU was signed August 27, 2004. It creates what its proponents call a "public private partnership". However it is named, the essence of the arrangement is that RLFF will pay for the MLPA regulatory process.

The MOU sets out a very broad arrangement by which the RLFF undertakes to pay for virtually the entire cost of the "initiative" to comply with MLPA. The MOU recites that RLFF was to submit a "Funding Description" which was to contain a "description of the funds the Foundation will contribute". Page 6. The MOU obligates the RLFF to provide funding for staff and consultants of the "Task Force" recognized in the MOU through December 31, 2006. The MOU obligates the RLFF, with the concurrence of the chair of the "Task Force" called for by the contract, to contract with staff to support the Task Force. The MOU requires the RLFF to pay for the "Task Force" and the "Science Team"[10] referred to in the MOU. And, the MOU requires RLFF to pay for (up to $750,000) the salaries, costs and expenses of Department of Fish and Game personnel who are tasked to the "Initiative".

In a nutshell, the MOU obligates the RLFF to pay for essentially the entire cost of the "initiative" to do what can be done to comply with the Legislative commands in the MLPA. It is

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[9] A statement by RLFF posted on the DFG website says: "Funders of RLFF's work to conserve and restore marine ecosystems include the David and Lucile Packard Foundation, the Marisla Foundation, and the Gordon and Betty Moore Foundation." http://www.dfg.ca.gov/mrd/mlpa/funders.html The Gordon and Betty Moore Foundation website describes the grant as follows: "With this three-year, $3.22 million grant, Resources Legacy Fund is working to relaunch California's Marine Life Protection Act." http://www.moore.org/grantees/grant_summaries_content.asp?Grantee=rlf

[10] The MOU purports to empower the Director of the Department of Fish and Game to change the membership of the "master plan team" specified by the Legislature in Section 2855(b)(1) and further recites that the name of that group is to be changed to the "Master Plan Science Advisory Team", referred to by the shorthand "Science Team" in the MOU.

not clear how much private interest money is being funneled into the regulatory process in this way. By any measure, however, the sums are very substantial.

The DFG website carries a "Budget report" dated April 12, 2005.[11] That budget report contains, as Figure 2, a description of the funding prepared by RLFF. The report states that in the period from August 27, 2004 through December 31, 2006, RLFF has paid and will pay over $6.9 million toward a projected total, including the value of what are called "in kind" public "contributions" of $8.3 million. RLFF thus estimates it, and its funding backers (whoever they may be) will pay over 75% of the estimated costs of preparing the plan and regulations required by MLPA.

All public officials should be deeply troubled by an arrangement in which a private interest group pays for the development of regulations. Interest groups should and do make their interests and desires known to legislators and regulators. But in our system of government, such groups do not pay for developing the regulations in which they have an interest. Good intentions cannot justify turning the regulatory process over to well-funded advocacy groups. The MOU gives the Department of Fish and Game money to try to do at least some of what the Legislature required it to do, and that is, so far as it goes, admirable. Coastside supports funding of the Department to allow it to do its job, but cannot support, and will oppose, private payment for the development of public regulations.

The Legislature should make budgetary provisions to ensure that what it says must be done can be done, but if the Legislature does not do so, California's regulators cannot turn to private funding arrangements.[12] We will not set out here at any length the reasons why, apart from public policy, interest group funding of regulations cannot pass muster. We will note, briefly, that such private funding is not authorized by any statute and that if it were to be authorized by a statute it would be an improper and unconstitutional purported delegation of the Legislative power conferred by the California Constitution.

The MOU, of course, contains recitals that the Department and the Commission will do everything they are supposed to do by law. That is not an answer. In the first place, quite apart from any MOU, regulators must follow the law. And, Coastside does not think it should be necessary to assert or to establish that the private funding in fact skewed the process – although nobody volunteers to pay $7 million for regulations they do not like. The point is that Californians cannot and should not be required to abide by a system in which regulations get made or not made depending on whether an agency can drum up private funding.[13]

The MOU, entered into after statutory deadlines had passed, reflects and formalizes decisions concerning deviations from MLPA requirements. The fact that the deviations were agreed to is of course irrelevant, as none of the parties to the agreement were authorized to

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[11] http://www.dfg.ca.gov/mrd/mlpa/pdfs/agenda9a_041105.pdf

[12] Consider for example these issues. Should the Department of Fish and Game have "gone out to bid" – asking industry groups to bid and awarding the "contract" to pay for the regulatory process to the highest bidder? Should the Department have required as a condition of taking any funding from the "environmental" advocates that equal funding be put up by industry? Do we want a regulatory system that begs money from some to draft regulations that will affect others?

[13] The DFG website and the MOU make it crystal clear that it is the position of the Department that it did not have enough money to meet the legislative requirements of MLPA and it ibis perfectly obvious that those requirements would have been ignored – there would have not been even an effort at partial compliance – without the money put up by RLFF and its backers.

change any of the statutory requirements. In pertinent part, though, the MOU reflects these departures from the requirements of MLPA:

- Despite the requirement of MLPA that the master plan be adopted by the Commission by December 1, 2005, the MOU recites that the decision had been made by the Department to prepare the plan in phases. The MLPA does not permit this and requires that the plan – a single plan – be adopted by December 1. See Recital G.
- The MOU recites that instead of a plan, the Department intended to prepare a "Master Plan Framework" which is described as a document that addresses "certain of the matters" set out in MLPA Sections 2853(c) and 2856(a)(2) – and the "taskforce" contemplated by the MOU would decide which of those certain matters to include in the framework. See Recital G. Section 2853(c) regulates the "program", not the "plan", but, more importantly, the Legislature did not confer discretion to adopt some, but not all, of the specific elements it mandated by included in the plan.
- The MOU provides that the "framework" document would include a timeline to design MPAs in phases by region, beginning with the development of alternative networks of MPAs for one specific area along the central coast as part of the first phase. See Recital G. The MLPA requires a plan on a deadline, not a framework for developing succeeding phases of a plan.
- The MOU required the Secretary of the resources Agency to appoint a so-called Blue Ribbon Task Force that was to be broadly charged with overseeing the work covered by the MOU. The MLPA does not authorize such a private enterprise group, although it does authorize contracting the preparation of the required plan. But, the MOU is not a contract by which the Blue Ribbon task Force (or any other group) is to prepare the plan required by MLPA, it is, instead, a contract to fund activity that is related to, but does not comply with, the MLPA.
- The MOU required the Director of the Department to expand the membership of the master plan team specified by MLPA by up to eight scientists and to rename it the Master Plan Science Advisory Team. Augmentation of the team is commendable, but so far as we can tell, the team (whatever its name) did not include the DWR or Parks and Recreation representatives required by MLPA. More importantly the MOU provided that this "Science Team" would be charged by the Director with fulfilling "certain of the obligations of the Master Plan Team under the MLPA". The statute does not give discretion to charge the team (however named) with responsibility for only some of the matters laid out in the Act.

Coastside has no doubt that the Department of Fish and Game and the Resources Agency were well motivated when they decided to take the RLFF money. Those good intentions, though, cannot justify private funding of lawmaking and they do not excuse departures from the legal requirements of the MLPA.

V. THE DRAFT FRAMEWORK IS DEEPLY FLAWED

The "Draft Master Plan Framework" recommended to the Department by the MLPA Blue Ribbon Task Force has been posted on the DFG website together with an April 18, 2005 transmittal letter from the Task Force. Presumably, this document is the "master plan" required

by the MLPA or is a proposed substitute for that plan. Coastside is not aware of any draft or other document purporting to be the "program" required by MLPA, nor is Coastside aware of any draft regulations. So, it is to that April 15 Framework that we direct our comments.

The Introduction to the Executive Summary describes an initial central coast study region as to which the task force will, by March 2006, forward "alternative proposals of MPAs to DFG for consideration and submission to the Commission. There are no proposals impacting the other two biogeographic regions defined by the Legislature.

Coastside believes that the draft master plan now before the Commission is deeply flawed for several reasons.

First, it is the product of a highly unusual, in fact unprecedented, process in which a private group paid for the public regulations which will be issued. No matter how benign or well intentioned the participants may have been, it is remarkable that public regulations are to be generated by private funding. Consider, for example, the howls of indignation that would arise if industry were to be allowed to offer to fund the making of workers' compensation regulations, or if insurance companies were to be allowed to fund the making of regulations governing the business of insurance. Consider the "environmental" lawsuits that would have already been filed if the Department had contracted with Exxon to fund MLPA plan preparation.

More importantly, and quite apart from politics, Coastside is unaware of any statutory grant of authority authorizing a contract such as the MOU involved here. If there were such a statute, it could not stand California Constitutional scrutiny.

Second, there has been substantial deviation from the procedure spelled out and required by the Legislature in order to craft the Framework now before the Department. For example, the siting workshops that were to develop recommendations for alternative networks of MPAs did not do so. There was no transmission of alternative network proposals and of a preferred alternative from the team to the Department. The Department has neither a set of proposals nor any preferred alternative to give to the Commission. The evaluation of and selection from competing proposals that was at the heart of the MLPA simply did not occur.

Third, the draft master plan simply does not contain the elements required by the MLPA. Indeed the core requirement of the MLPA is not met -- there is no preferred alternative network of MPAs in each of the three legislatively defined biogeographical areas. There was no choice among alternative networks of MPAs in the three areas.

Fourth, there is no analysis of the existing MPAs –80 or more in number as listed on the Department's website. There is no informed recommendation as to whether those 80 sites should be consolidated, abolished, reclassified or managed differently so that, as a group, they best achieve the aspirational goals of the MLPA.

Fifth, the draft Framework is not a plan for how to reconfigure and manage networks of MPAs, it is, in reality, only a plan for continued process and procedure aimed at generating new MPAs.

For these reasons, and for others that might be advanced[14], the Commission should reject the draft Framework.

[14] The entire draft plan reflects a bias toward coming up with a process to set up new MPAs, especially reserves. As a whole, it reflects a basic misinterpretation of the commands and requirements of the MLPA.

A. THE DRAFT FRAMEWORK CONTAINS SIGNIFICANT MISINTERPRETATIONS OF THE MLPA

The Executive Summary asserts a number of propositions which cannot be supported by the text of the MLPA. For example:

- The MLPA requires that representative habitats be protected by more than one marine reserve in each biogeographical region (of which three are identified in the MLPA). Page 4.
    - This is a fundamental misstatement of the law. It implies that each "habitat" must be protected by at least two no take zones in each biogeographic region. Significantly, though, the statute does not require the implementation by the Commission of <u>any</u> new no take reserves. It does require that the master plan contain a <u>recommendation</u> to the Commission for a preferred alternative that includes an "improved marine life reserve component" [Section2857(c)] and it says that marine life reserves in each bioregion [sic] shall encompass a "representative variety" of marine habitat types and communities. This language is not a model of clarity, but it cannot reasonably be read to mean that there must be a no take zone that covers every "habitat" and "community" no matter how common and thriving they might be. The language seems reasonably to mean that no take reserves – to the extent they are deemed necessary by the Commission – should encompass a representative variety of habitat and communities of the types germane to that which the Commission seeks to protect. Nothing in the statute can be read as requiring or suggesting that the Commission must or should establish a no take reserve.
- The MLPA "calls for protecting representative types of habitat in different depth zones and conditions[15]. Page 3.
    - In fact, the MLPA does not "call for" any such thing. Section 2856 (a)(2) requires the master plan to set out <u>recommendations</u> for the extent and type of habitat that should be represented in the MPA system. This is a far cry from "protecting" all types of habitat in different zones and conditions.
- The "principal element" of the goals of the Program "is a statewide network of MPAs". Page 2.
    - Significantly, the MLPA in fact says that the sixth, last listed, goal is to ensure that MPAs "are designed and managed, to the extent possible, as a network." Section 2853((B)(6) Section 2856(a)(2)(D) specifies that the master plan shall include recommended alternative networks of MPAs, including marine life reserves in each biogeographical region that are capable of achieving the goals of Section 2853. Section 2856(a)(2)(F) refers to a preferred siting alternative for a network of MPAs. The phrase "statewide network" is misleading, and the Executive Summary in fact recognizes that the MLPA does not define network

[15] This is a very provocative misinterpretation of the statute, because if it is assumed that representative habitats in various zones and conditions must be "protected", then there is an infinite (or at least very lengthy) list of permutations of "habitat" and depth zones. For example, the current science team lists five depth zones and 11(?) habitats

and the Legislature identified a need to "reexamine and redesign" the MPA system to increase coherence and effectiveness. Section 2853(a). Importantly, the reference to designing and managing the MPAs as a "network" contains the important limitation to the extent "possible". And, again, we note that nothing in the law requires a network defined by "larval dispersal."

- The Executive Summary describes guidelines for the design of MPA networks developed by the Master Plan Science Advisory Team ("SAT") for the MLPA initiative. See Framework, page 3. These guidelines may reflect the thinking of the SAT, but they are in no way required or even suggested by the MLPA.[16] The following statements are incorrect, and do not state the requirements of the MLPA:
    - Every key marine habitat should be represented
    - At least 3-5 "replicate" MPAs in each habitat type within biogeographic regions
- The MLPA reflects prevailing views concerning aiding the recovery of fisheries (at the same time it is stated that there remains disagreement whether MPAs and no take reserves provide benefit to fisheries). Page 1.
    - Nothing in the statute says or supports this.

B. THE DRAFT FRAMEWORK REFLECTS AN IMPROPER ANTI-FISHING BIAS

Perhaps the most substantial misstatement of the law occurs in Appendix G to the draft master plan. This is, nominally, a list of species likely to benefit from MPAs. In fact, it is nothing but a list of all fish and animals that are harvested in California (and some that are not because of current protections). The following statement appears: "By definition, the primary change from the establishment of an MPA is a reduction in fishing effort within the MPA and a reduction in the removal of organisms due to fishing." And, so the flawed reasoning goes, therefore, the beneficially impacted species in any MPA are all of those targeted in fisheries because fisheries will all be curtailed. This passage reveals the agenda of the private environmental organizations that funded the work. It is an agenda that assumes fishing will ("by definition") be curtailed in MPAs. It presumes that is a good thing, and it takes for granted that such reduction in fishing is necessarily a "benefit." This is an agenda that simply cannot be validated by the language or the spirit of the MLPA, and it is an agenda which reveals a deeply flawed "understanding" of fishery management, i.e., a belief that all reduction in fishing is "good."

The MLPA very specifically provides that fishing is allowed in MPAs (except for no-take reserves). Nothing in the MLPA says or implies that fishing will be curtailed, other than in no take reserves (in which fishing is simply abolished). Whether and to what extent there should be changes in regulations related to fishing (commercial or recreational) in an area that is designated as an MPA is a question completely separate from whether or not the area should be designated as an MPA.

[16] Appendix I continues the distortion of the Act by referring to a "requirement" of the Act to encompass representative habitat types and communities in no take refuges.

VI. COASTSIDE'S PROPOSAL FOR A MASTER PLAN WHICH COMPLIES WITH MLPA REQUIREMENTS

Statutory Bottom Lines: There must be a "plan" and a "program" and regulations by December 1, 2005. The master plan must include actual concrete present recommendations for MPA networks – not merely a process for coming up with such recommendations in the future. The program must have as a goal to ensure that all MPAs "are designed and managed, to the extent possible, as a network". It is required that the program have "an *improved* (from 1999) marine life reserve component consistent with the guidelines in Section 2857(c).

The statute technically does not require the implementation of any MPAs or reserves, so long as there is a plan with recommendations. There must, be a "program" with an "improved" reserve component. Since the statute was enacted in 1999, it is important to understand that increases in reserves since 1999 are qualifying improvements. Notably, of course, the dramatic addition of the Channel Island reserve areas is one such substantial improvement.

Coastside proposes that the Commission require expedited preparation of a draft plan that would have these core features:

- Designation of the California halibut trawl grounds specified in Section 8495 of the Fish and Game Code (as modified by SB 1459 in 2004) as an MPA.
- Designation of the trawl area now open between False Cape and Point Reyes, F&G Code Section 8842, as an MPA.
- Designation of the cow cod conservation areas as MPAs.
- Designation of the geographic bounds of the deep water rockfish closures as an MPA.
- Recommendations for the inclusion of the Channel Islands MPA and reserve as part of the network of MPAs and designation of the area as a special zone to be used as the basis for scientific study as to the efficacy of "no take" zones.
- Recommendations for integrating and managing as properly configured networks the 80 or more existing MPAs, together with the new MPAs.

Coastside believes that this bold proposal best keeps faith with the Legislature's commands. It designates an enormous swath of California coastline as an MPA and facilitates management of that broad and diverse band as a part of the other MPAs and networks of MPAs that rationally fit with and within it. Each of the new MPAs fits squarely into the definition of an MPA – discrete marine geography, primarily intended to conserve marine life and habitat. By and large the new MPAs reflect the considered wisdom of the many professionals (state, federal and private) and stake holders who labored to create the existing regulations which define the areas. The new "bottom trawl" MPA reflects, we believe, accumulated wisdom concerning the need to address the major detrimental impacts of that fishery. Most importantly, from Coastside's perspective, this proposal serves to redirect and refocus effort where we believe it should be (and where the Legislature clearly said it should be) – on evaluating and improving the enormous, often hodge-podge, collection of de jure and de facto MPAs along California's coast.

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Respectfully submitted,
Coastside Fishing Club
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